Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Elehue Kawika Freemon and Lucille K. Freemon,	)	CC Docket No. 94-89
	)	
Complainants,	)	
	)	File No. E-90-393
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

AT&T REPLY

Pursuant to Sections 1.45 and 1.251 of the Commission's Rules, 47 C.F.R. §§ 1.45 and 1.251, AT&T Corp. ("AT&T") hereby replies to the oppositions to its motion for summary decision dismissing this matter.

The complainants bear the burden of proceeding and proof on the factual issues that form the basis for their claim against AT&T in this action.[1] However, they have presented no admissible evidence supporting their allegations, and the undisputed evidence shows that their May 30, 1988 telephone conversation was not intercepted or divulged by AT&T. On this record, no hearing is required or even permissible; it is clear that summary decision must be rendered in AT&T's favor.

1 See Elehue Kawika Freemon, et al. v. AT&T, 9 FCC Rcd 4032 (1994) (¶ 11) ("Hearing Designation Order").

ARGUMENT

I. THERE IS NO GENUINE FACTUAL ISSUE REGARDING THE ALLEGED VIOLATION OF THE COMMUNICATIONS ACT.

AT&T's Motion showed (pp. 3-11) that there is no admissible evidence -- and, thus, no genuine issue of fact requiring a hearing -- that any AT&T personnel acting within the scope of their duties intercepted or divulged the alleged telephone conversation between complainants on May 30, 1988. Specifically, both the Complaint and Elehue Freemon's sworn deposition testimony admit that he has no personal knowledge of the alleged interception of his call, because he claims to have been "blanked out" of the purported discussion between Lucille Freemon and an unidentified operator. His only "knowledge" is hearsay allegedly imparted to him after the fact by Lucille Freemon.[2] For her part, Mrs. Freemon's sworn testimony expressly denies that any interruption of the call took place as Mr. Freemon

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[2] See AT&T Motion, pp. 4-5. Although it is not essential to the disposition of this motion for summary decision, AT&T notes that the record now includes undisputed evidence that Mr. Freemon's account is impossible in light of the operational and transmission characteristics of AT&T's operator equipment. See Direct Testimony of Thomas C. Sharpe (AT&T Exhibit B), p. 5, line 8 to p. 7, line 5, and AT&T Exhibits 5 and 6 (already admitted in evidence). The undisputed record also shows that Mr. Freemon, an MCI presubscribed customer, could not in fact have reached the AT&T operator without first dialing an access code, which he denies having done. See AT&T Exhibit B, p. 7, line 10 to p. 8, line 26.

alleges; rather, she admits that Mr. Freemon merely attempted to place (but did not complete) a collect call to her, at which time she requested the AT&T operator to obtain help for her son.

There is thus no evidence in the record to sustain the complainants' allegations against AT&T. At the November 28, 1994 evidentiary admission session, the Presiding Officer correctly excluded complainants' other purported exhibits, consisting of such items as the affidavit of Re Shea Plunkett containing multiple levels of hearsay, and unauthenticated purported records of the Portland emergency services agency for which no grounds for admission had been shown.[3] Given these rulings, and the undisputed record evidence described above, summary decision must be entered in AT&T's favor unless complainants or the Bureau can demonstrate the existence of a genuine issue of fact.

Both of those parties' filings fall woefully short of even attempting to make such a showing.[4]

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[3] The Presiding Officer also properly excluded for proof of its truth the Complaint in this action, including the alleged affidavit of Lucille K. Freemon (which, in all events, she has categorically repudiated in her deposition testimony).

[4] See Complaints [sic] Opposition and Counter motion to AT&T's Corp. [sic] Summary Decision [sic] dated November 22, 1994 ("Opposition"); Brief for the Common Carrier Bureau ("Bureau Brief"); Comments in Response to AT&T's Motion for Summary Decision ("Bureau Comments").

Complainants' Opposition (which, like virtually all of their filings in this case, is largely incomprehensible) appears to contend that the Presiding Officer should reverse the rulings made at the evidentiary admission session.[5] Their filing, however, identifies no factual or legal justification for modifying any of those rulings.[6] Nor does their Opposition adduce any other record evidence which could conceivably support a finding that the Freemons' alleged telephone conversation was intercepted or divulged.[7] In short, these parties have offered no basis for the Presiding Officer either to deny AT&T's motion for summary decision or to proceed with the December 12 hearing in this case.

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[5] See Opposition, pp. 5-6. For the reasons stated at the November 28 hearing, as well as in this Reply, AT&T opposes complainants' "counter motion" to admit materials already excluded from evidence in this matter.

[6] For example, complainants' argue (Opposition, p. 3, n. **) that the Re Shea Plunkett affidavit is not hearsay because the affiant "received her information from Mrs. [Freemon] directly." The Opposition nevertheless fails to provide any basis under the hearsay rule (and there is none) for admission of the alleged out-of-court statement by Mrs. Freemon to Ms. Plunkett.

[7] Besides citing and attaching copies of the very "evidence" already excluded by the Presiding Officer, the complainants also attach copies of material from their Complaint (which has not been admitted for its truth), and portions of several AT&T filings in which AT&T denies the truthfulness of the complainants' allegations. These materials could not provide any factual support for complainants' claims, except perhaps in Mr. Freemon's tortured logic.

The Bureau's response to AT&T's motion is even more troubling. It readily concedes that Mr. Freemon has "proffered surprisingly little evidentiary support for the allegations set forth in [the] complaint," but fails to rebut AT&T's prior showing there is absolutely no evidence in this record to support the Freemons' claim.[8] Indeed, the Bureau does not point to any written testimony, exhibits or deposition testimony allegedly supporting complainants' account of the events. Instead, the Bureau makes the astonishing claim that merely because Mr. Freemon "intends to appear at the scheduled December 12 hearing to present his version of the facts," that alone requires denial of summary decision in AT&T's favor.[9]

Even it were permissible for Mr. Freemon to testify at the scheduled December 12 hearing (and it is not),[10] that fact has no bearing on a motion for summary decision. First, all that Mr. Freemon could presumably testify to is the same account of events already presented in the complaint and his sworn deposition

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[8] See Bureau Comments, p. 4.

[9] Id., pp. 4-5.

[10] Paragraph 14 of the Prehearing Order in this case, released August 19, 1994, required the parties to file sworn written direct testimony in support of their cases on November 10. Mr. Freemon failed to offer any such material at that time, and thus is barred from presenting direct testimony.

testimony. As AT&T has already shown, that testimony demonstrates that he has no personal knowledge of any alleged interception or divulgence of his call, and thus fails to establish a triable issue of fact.

Second, and in all events, Mr. Freemon is not entitled to reserve until the hearing his purported evidence in response to AT&T's motion for summary decision. The very purpose of such motions is to pierce the pleaded allegations of the parties and determine whether there is any factual basis for those claims. Section 1.251(b) of the Commission's rules, 47 C.F.R § 1.251(b), expressly provides that:

> "A party opposing the motion may not rest upon mere allegations and denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing . . . ." (Emphasis supplied)

Mr. Freemon therefore is not entitled to defer his showing until the hearing; he is required to demonstrate now that there is a triable factual issue, and he has completely failed to do so. Because neither he nor the Bureau have identified any evidence creating a genuine issue of material fact, the Presiding Officer should cancel the December 12 hearing and enter summary decision in AT&T's favor dismissing this action.

II. THE COMPLAINT FAILS TO STATE A CLAIM UNDER SECTION 705 OF THE COMMUNICATIONS ACT.

Even if there were any evidence to support complainants' allegation that their telephone conversation was intercepted and divulged (and as shown above there is not), AT&T's Motion also demonstrated (pp. 12-13) that this action must be dismissed because it does not state a claim under Section 705 of the Communications Act (47 U.S.C. § 605), which is the sole predicate for the Commission's jurisdiction over this claim. Specifically, AT&T showed that for the past 25 years Section 705 by its express terms has been restricted to interceptions and divulgences of radio communications, while it is undisputed that complainants' alleged communication here was conducted as a wireline telephone call. Thus, this matter is not actionable under Section 705 even if there were any factual support for the Freemons' claim.

Only the Bureau attempts to present any reasoned argument in opposition to AT&T's showing described above.[11] It first claims (p. 5) that it is somehow improper for AT&T's Motion to raise this issue because the Hearing Designation Order provides for the

[11] Complainants' response to AT&T's Motion merely states cryptically (p. 4) that this issue "can only be answered by the review of the Commission by the continuation of this case."

Presiding Officer to determine whether, in light of the evidence, AT&T's alleged conduct violated Section 705.[12] But this is the very issue on which AT&T's Motion seeks a ruling, based on application of controlling law to the undisputed facts concerning the communication medium allegedly used in the Freemons' call. There is no inconsistency between this requested relief and the Hearing Designation Order.

The Bureau also claims (pp. 5-6) that Section 705 is not limited to interceptions of radio communications, citing the first sentence of that statute which prohibits improper divulgences by persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate . . . communications by wire or radio." The Bureau conveniently ignores the fact that as shown above the record is devoid of any evidence that AT&T's operator had intercepted any communication between the Freemons, without which it would have been impossible for her to improperly divulge the contents of that conversation to another person. The Bureau likewise overlooks the fact that the federal courts have held this portion of the statute is solely applicable to record carrier communications transmitted or received by "persons such

[12] See 9 FCC Rcd at 4034 (¶ 11).

as telegram or radiogram operators, who must either learn the content of the message or handle a written record of communications in the course of their employment."[13] By contrast, the courts have held that because telephone company personnel can only learn the contents of a communication by interception, the first sentence of Section 705 is inapplicable to such personnel.[14]

Thus, Section 705 has no application to the alleged interception and divulgence by AT&T's operator of the Freemon's May 30, 1988 wireline telephone call. Because it is clear on the record that no interception or divulgence of a radio communication occurred in this case

[13] See United States v. Russo, 250 F. Supp. 55, 59 (E.D. Pa. 1966); accord, United States v. Covello, 410 F.2d 536 (2d Cir. 1969); Snider Communications Corp. v. Cue Paging Corp., 840 F. Supp. 664 (E.D. Ark. 1994).

[14] See, e.g., United States v. Russo, 250 F. Supp. at 59. Even if the first sentence of that section could somehow be deemed applicable to AT&T personnel, moreover, the undisputed evidence shows that the AT&T operator's conduct did not contravene that provision of the statute. Section 705 excepts from its prohibition on divulgences acts which are authorized by the federal wiretap statute (18 U.S.C. §§ 2511 et seq.). In turn, 18 U.S.C. § 2511(2)(a)(i) permits an AT&T employee to "disclose or use [a] communication in the normal course of [her] employment while engaged in any activity which is a necessary incident to the rendition of [AT&T's] service . . . ." The operator's referral of Mr. Freemon's call to the Portland 911 emergency services was clearly incident to AT&T's normal service; under AT&T's Operator Services Practice on emergency calls (admitted in evidence as AT&T Exhibit 3), its personnel are directed to "take whatever action appears necessary" when a caller displays symptoms such as the difficulty breathing that Mr. Freemon concedes he exhibited. See also Direct Testimony of Linda Wistermayer (AT&T Exhibit A), p. 5 lines 21-27, and p. 6, lines 8-19.

(and, indeed, that no interception or divulgence whatever occurred), this action should be dismissed for failure to state a claim under Section 705.

III. THIS ACTION IS TIMEBARRED UNDER SECTION 415 OF THE COMMUNICATIONS ACT.

Finally, AT&T's Motion showed (pp. 14-17) that this action must in all events be dismissed because it was filed more than ten weeks after the expiration of the two-year statute of limitation prescribed by Section 415(b) of the Communications Act, 47 U.S.C. § 415(b). In particular, AT&T demonstrated (id.) that the "relation back" provision of the Commission's informal complaint rules (47 C.F.R. § 1.718) is inapplicable here, because the formal complaint in this proceeding was filed well more than six months (in fact, not until more than sixteen months) after AT&T's April 28, 1989 response denying liability for the Freemons' informal complaint.

Neither the complainants nor the Bureau dispute that the statute of limitations had in fact expired before this action was filed, and that the Commission's relation back rule is inapposite here.[15] Indeed, the

[15] Complainants, while asserting that they "must rely on the answer from the [Bureau]" to this issue, contend that the Commission "may not have to obey its own rule" and may entertain this case even though the limitations period has expired. See Opposition, p. 5. Complainants simply ignore the fact that Section 415(b) is not an "agency rule," but a Congressionally established restriction on the Commission's jurisdiction to entertain

(footnote continued on following page)

Bureau concedes, as it must, that under controlling case law the expiration of the limitations period extinguished the underlying liability for complainants' claim, as well as any remedy.[16] The Bureau also does not -- nor could it -- dispute AT&T's showing that this lapse is a jurisdictional bar to the Commission entertaining this action. Remarkably, however, the Bureau asserts this issue "is not properly before the Presiding Judge" because that issue was not specified in the Hearing Designation Order.[17]

(Footnote continued from preceding page)

claims. Compare United States v. Caceres, 440 U.S. 741, 749 (1979)(finding that court was not required to follow an IRS regulation because that rule was not statutorily mandated). Thus, the Presiding Officer is not free to ignore the legislatively prescribed limitations period, as complainants' cavalierly suggest.

[16] See Bureau Comments, p.7 and n 16.

[17] See id., p. 8. Alternatively, the Bureau contends (id.) that the Hearing Designation Order "effectively disposed of" the Section 415(b) issue in this case -- despite the fact that the Commission's decision makes absolutely no mention of the statute of limitations defense. Its failure to do so is especially noteworthy because, as the Bureau concedes (p. 8, n. 18), AT&T had raised this issue a full year prior to the Commission's decision. See letter dated August 12, 1993 from Peter H. Jacoby, AT&T to Thomas D. Wyatt, FCC. However, the Bureau staff (which drafts the Commission's orders) apparently omitted this issue when it prepared the Hearing Designation Order. See 9 FCC Rcd at 4032 (¶ 3)(referring generally to "numerous pleadings and related motions" filed after the complaint, answer and reply). But in all events, the salient fact is that the Commission has made no ruling on the Section 415(b) issue; where the Hearing Designation Order sought to resolve the parties' pretrial motions, it did so explicitly. See 9 FCC Rcd at 4034 (¶ 15)(denying

(footnote continued on following page)

The Bureau's claim is arrant nonsense. It is hornbook law that a tribunal's lack of subject matter jurisdiction can be raised by a litigant at any point in a case -- including after a verdict or judgment has been rendered, and even on appeal.[18] This fundamental jurisdictional principle is equally applicable to courts and administrative agencies such as the Commission.[19] Thus, AT&T is not foreclosed from raising the Section 415(b) issue before the Presiding Officer on this motion. Because neither complainants nor the Bureau have furnished any reason why this action is not timebarred, the complaint should be dismissed for this additional reason.

(Footnote continued from preceding page)

complainants' motion for "Discovery Through Use of Public Opinion").

[18] See 1 Moore's Federal Practice, § 0.60[4]; Business Buyers of New England, Inc. v. Gurham, 754 F.2d 1, 2 (1st Cir. 1985); City of Long Beach v. Dept. of Energy, 754 F.2d 379, 374 (Temp. Emer. Ct. App. 1986).

[19] See, e.g., Plaquemines Port, Harbor and terminal District v. Federal Maritime Commission, 838 F.2d 536, 542 (D.C. Cir. 1988)..

CONCLUSION

For the reasons stated above and in AT&T's motion, the scheduled December 12, 1994 hearing in this matter should be canceled and summary decision should be entered in this matter in favor of AT&T.

Respectfully submitted,

AT&T CORP.

By _____

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December 7, 1994

CERTIFICATE OF SERVICE

I, Helen Elia, hereby certify that a true copy of the foregoing "AT&T Reply" of AT&T Corp. was this 7th day of December, 1994, served by first class mail, postage prepaid, upon each of the following persons:

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